

**REMARKS OF CHIEF JUDGE U.W. CLEMON
AT THE SENTENCING IN *United States v. Livesay*
Case Number 2:03-cr-0182-UWC
December 14, 2005**

**I MAKE THESE PRELIMINARY REMARKS NOT AS ONE OF THE
TWELVE ARTICLE THREE JUDGES OF THIS COURT, BUT AS THE
CHIEF JUDGE OF THE NORTHERN DISTRICT OF ALABAMA, THE
SPOKESPERSON FOR THE COURT AS A WHOLE.**

**LURKING NOT TOO FAR IN THE BACKGROUND OF THIS
SENTENCING IS THE JURY'S VERDICT IN THE RICHARD SCRUSHY
CASE. THE JURY IN THAT CASE, AS IN ALL OTHER JURY CASES IN
FEDERAL COURT, IS A COMPONENT OF THE FEDERAL JUDICIARY.
EACH FEDERAL JUDGE IS ETHICALLY OBLIGED TO UPHOLD THE
INTEGRITY OF THE FEDERAL JUDICIARY.**

**TO MY KNOWLEDGE, NO ONE HAS ALLEGED THAT ANY OF THE
JURORS IN THE SCRUSHY CASE WERE IN ANY WISE COMPROMISED
AS THEY HEARD THE EVIDENCE, DELIBERATED, AND RETURNED A
UNANIMOUS VERDICT OF "NOT GUILTY." FOR FIVE MONTHS OF THIS
YEAR, THEY PAID THEIR CIVIC DUES BY SERVING AS JURORS. THEY
DID NOT VOLUNTEER TO SERVE; RATHER THEY SHOWED UP**

BECAUSE THIS COURT COMMANDED THEM TO BE HERE. WHEN THEY WERE CHOSEN AS JURORS, THEY SAT THROUGH WHAT I BELIEVE TO BE THE LONGEST JURY TRIAL IN THE HISTORY OF THIS COURT. FOR THAT MOST UNUSUAL SERVICE, THE COURT EXPRESSES TO THEM, INDIVIDUALLY AND AS A GROUP, ITS MOST PROFOUND GRATITUDE.

AS FEDERAL JUDGES, WE RESPECT THEM AND THE INVALUABLE ROLE THEY PLAY IN THE IMPLEMENTATION OF THE SACRED SIXTH AMENDMENT RIGHT OF THE ACCUSED TO A TRIAL BY A JURY OF TWELVE CITIZENS, RATHER THAN A TRIAL BY A SINGLE JUDGE. AND ONCE THAT JURY OF TWELVE RETURNS A “NOT GUILTY” VERDICT ON A PARTICULAR CRIMINAL CHARGE, IN OUR LEGAL SYSTEM, THE DEFENDANT IS THEREAFTER ENTITLED TO THE PRESUMPTION OF INNOCENCE WITH RESPECT TO THAT CHARGE.

IT IS NOT A MATTER OF WHETHER WE AS INDIVIDUAL CITIZENS OR JUDGES AGREE WITH A JURY’S NOT GUILTY VERDICT. OF COURSE, AS INDIVIDUALS, EACH OF US IS ENTITLED TO HIS OR HER PERSONAL OPINION. BUT BEFORE ATTACKING A JURY’S VERDICT IN OPEN COURT, IT IS IMPORTANT TO REFLECT ON THE FACT THAT WE

DID NOT SIT IN THE COURTROOM AND HEAR AND CONSIDER ALL OF THE EVIDENCE, AS THE JURORS DID. BASICALLY, WHAT WE KNOW ABOUT THE CASE IS, AT BEST, BITS AND PIECES AND WHAT WAS REPORTED BY THE MEDIA. AFTER HEARING AND CONSIDERING ALL OF THE EVIDENCE, IT WAS THE EXCLUSIVE PROVINCE OF THE JURY TO DECIDE WHETHER THE GOVERNMENT HAD PROVED RICHARD SCRUSHY TO BE GUILTY AS CHARGED IN THE INDICTMENT.

I END THESE REMARKS WITH A PUBLIC EXPRESSION OF GRATITUDE FROM THIS COURT TO THE JURY TO THE DEDICATED JURY IN THE SCRUSHY CRIMINAL CASE FOR ITS OUTSTANDING PUBLIC SERVICE.

STATEMENT OF REASONS FOR EXTRAORDINARY DEPARTURE

§ 5K.1.1 Factors

I. Evaluation of the Significance and Usefulness of Defendant's Assistance

He testified for four days in the case against Richard Scrushy.

He testified for two days in the case against Sonny Crumpler.

According to the Government, the Defendant has provided **invaluable assistance** in assisting the United States, HealthSouth, and the forensic auditor to discover, in an expeditious manner, the varied ways in which the fraud at HealthSouth was conducted. He provided the Government with a **roadmap** for the ways by which HealthSouth and its officers manipulated the Company's accounting to present completely false operating results.

The Defendant provided essential information helping to quantify the hundreds of millions of dollars of fictitious income which appeared on HealthSouth's financial statements.

He provided with "critical documents" which were important to its investigation

The Defendant's assistance facilitated the securing of guilty pleas from other co-conspirators and the prosecution of Richard Scrushy and Sonny Crumpler.

Government's Evaluation of Assistance Rendered

As noted earlier, the Government has characterized the Defendant's assistance as "invaluable" and "essential."

On the first factor, the Court finds that the Defendant's assistance has been extraordinarily high; and warrants an extraordinary departure.

II. Truthfulness, Completeness, and Reliability of Information and Testimony Provided By the Defendant

A. Truthfulness

According to the Government, the Defendant's information has been truthful, accurate, complete, and reliable. According to the Government, the Defendant "has truthfully and completely confessed his misdeeds; he revealed what

he knew about the participation of others in the conspiracy; and the Government relied heavily on his testimony in the two cases which went to trial.

On the second factor, the Court again finds that the Defendant's assistance has been extraordinarily high; and warrants an extraordinary departure.

III. The Nature and Extent of Defendant's Assistance

In papers filed with the Court, and as found earlier, the nature and extent of the Defendant's assistance has been extremely substantial. The Defendant has willingly submitted to interviews over countless days, and submitted to six days of trial testimony. He loaned his expertise to the government investigators, and educated them in numerous lengthy meetings. He provided documentary evidence that he kept specifically because it was evidence of fraud.

As with the first two factors, the Court again finds that the Defendant's assistance has been extraordinarily high; and warrants an extraordinary departure.

IV. Injury Suffered, or Danger of Injury

To the Defendant Resulting From His Assistance

Other than the injury or danger of injury common to all persons who incriminate other co-conspirators and agree to cooperate with the Government and/or testify for the Government in a criminal case, the Defendant has not suffered any specific injury.

No extraordinary departure is warranted on this ground, standing alone.

V. Timeliness of the Defendant's Assistance

The Government describes the timeliness of the Defendant's assistance as immediate;" and the Court so finds.

FINAL FINDING

IF I AM WRONG ON THE EXTENT OF DEPARTURE, I BELIEVE

**THAT THE SAME SENTENCE IS THE MOST APPROPRIATE
SENTENCE IN THIS CASE UNDER BOOKER.**

SENTENCES IN RELATED CASES

1. Westin Smith	27 months
2. William Owens	60 months
3. Emery Harris	5 months
4. Angela Ayers	Probation - 48 months
5. Cathy C. Edwards	“
6. Rebecca K. Morgan	“
7. Virginia B. Valentine	“
8. Michael Martin	7 days
9. Aaron Beam	3 months

10. Richard Botts	Probation - 60 months
11. Will Hicks	Probation - 24 months
12. Catherine Fowler	Probation 24 months

***United States v. Martin*, 03-CR-374**

**STATEMENT OF REASONS
FOR EXTRAORDINARY DEPARTURE**

5K.1.1 Factors

**I. Evaluation of the Significance and Usefulness
of Defendant's Assistance; including Government's
Evaluation of Assistance Rendered**

This Defendant's unhesitating assistance gave the FBI, the SEC, HealthSouth auditors, and the shareholder plaintiffs an otherwise unavailable understanding of HealthSouth's finances, and the various techniques by which the fraudulent scheme was perpetuated.

The Court adopts as its findings the Government's own evaluation: Martin's assistance 1) enabled the Government to swiftly prosecute Richard Scrushy and several other major participants in the fraud, 2) allowed the Government to provide a timely assurance to the financial markets that the illegal conduct had ended and that corrective action was being taken; and 3) allowed HealthSouth to reconstruct its books and records and to begin its recovery.

This Defendant was one of the very few cooperating defendants who was able to provide personal, direct and first-hand knowledge of Richard Scrushy's

involvement in the scheme. He was one of the crucial witnesses in the Government's unsuccessful trial of Scrushy. His assistance to the SEC in the civil proceeding has likewise been substantial.

On consideration of all the evidence, the Court evaluates this Defendant's significance and usefulness to the Government (and the Court finds the SEC to be a government agency) to have been outstanding and invaluable.

II. Truthfulness, Completeness, and Reliability of Information and Testimony Provided By the Defendant

A. Truthfulness

The Court finds that the Defendant has been completely truthful with the Government.

B. Completeness

The Defendant's cooperation with the Government has met with the Government has been complete. He has met numerous times with the DOJ, numerous times with the SEC, Health South officials in their apparently successful effort to reconstruct the Company, and with the private litigants who are suing him. Of course, he testified for the Government in its unsuccessful trial of Richard Scrushy.

C. Reliability

The Court finds that this Defendant has been completely reliable; and the Government does not contend otherwise.

III. The Nature and Extent of Defendant's Assistance

The Government has represented to the Court that this Defendant's assistance has been equal to or greater than the assistance of any of the other co-conspirators, and the Court credits that representation. He met with the Government on at least ten occasions before his original sentencing; and he spent many hours reviewing HealthSouth's financial assets and statements.

IV. Injury Suffered, or Danger of Injury To the Defendant Resulting From His Assistance

This is a fraud case, and the risk of physical injury is predictably absent. But this Defendant's has subjected his financial well-being to imminent jeopardy, as he has helped the plaintiffs in the private actions directed at his bank account. His assistance to and cooperation with the Government and the forensic auditors in unraveling the fraud; and his admission of liability are virtually certain to result in substantial civil judgments against him.

V. Timeliness of the Defendant's Assistance

The Government has described this Defendant's cooperation as "immediate,"

and the Court so finds. From the time he was first contacted by the Government, this Defendant immediately admitted his wrongdoing, and disclosing the details of the fraudulent scheme and revealing its other participants. The Court agrees with the Government: this Defendant's immediate cooperation allowed the HealthSouth case to be prosecuted at a pace which, on a relative basis, constitutes swift and efficient enforcement" of the nation's criminal laws.

VI. Other Factors Bearing on the Reasonableness of a Sentence of Probation

Even after this Defendant has been sentenced in this case, he continued to render substantial assistance to the Government. He met with the Government between six to eight times between June and October 2004. From December to February, he spent more than fifty additional hours in at least twelve additional meetings with the Government, preparing for his trial testimony.

He testified for more than six days at the trial of Richard Scrushy.

The remarkable fact is that during all this additional cooperation, the Government was appealing his probation sentence and arguing that he, like Richard Scrushy, should be imprisoned for at least *** months.

JUSTIFICATION OF THE SENTENCE IMPOSED
18 U.S.C. § 3553 (a)

**A. THE NATURE AND CIRCUMSTANCES OF THE
CRIME AND THE HISTORY AND CHARACTERISTICS
OF THE DEFENDANT**

These crimes were an aberration in the otherwise outstanding life of this Defendant.

The conspiracy had been in existence before this Defendant's participation in it. According to the Government, during his involvement in the conspiracy and during his involvement with Richard Scrushy, this Defendant "tried vigorously to talk the CEO into abandoning that course of conduct. And he was partially successful in late 1999 in convincing the CEO to reduce the expectations that were being published to the public. Now in 2002, however, that CEO again went to some meetings with investors and began to up those projections again. {This Defendant} took note of this and decided that he could no longer stay, and that's when he decided to leave the Company."

B. THE NEED FOR THE SENTENCE IMPOSED -

**1) TO REFLECT THE SERIOUSNESS OF THE CRIME;
TO PROMOTE RESPECT FOR THE LAW; AND
TO PROVIDE JUST PUNISHMENT FOR THE CRIME.**

A sentence of seven days serves to reflect the seriousness of this Defendant's crime, to promote respect for the law, and to provide just punishment for the crime. Here, the principal defendant has been found not guilty; and will serve no time. To sentence this Defendant to a substantial prison term would undermine respect for the law.

**2) TO AFFORD ADEQUATE DETERRENCE
TO CRIMINAL CONDUCT; and 3) TO PROTECT THE
PUBLIC FROM FURTHER CRIMES OF THE DEFENDANT**

There is little doubt in the Court's mind that this Defendant has been effectively deterred from any further criminal conduct. His experience, as devastating as it has been, will deter others similarly situated, from taking the easy way out. The dispatch with which he came forward and admitted his guilt, and the invaluable assistance he provided the Government in discovering the details of the crime, and in prosecuting other more culpable criminal defendants all justify the relatively short sentence being imposed. A longer period of incarceration in these

circumstances would be greater than necessary to achieve the deterrence objectives, and would be unjust.

4) TO PROVIDE THE DEFENDANT WITH NEEDED EDUCATIONAL OR VOCATIONAL TRAINING, MEDICAL CARE, OR OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER

This is a non-issue, as the Defendant is already receiving treatment for his problem with alcohol.

C. THE KINDS OF SENTENCES AVAILABLE

Statutorily, the maximum is five years for Count One, and ten years for Count Two.

The Defendant is statutorily eligible for probation.

D. THE SENTENCING GUIDELINES

Under the Sentencing Guidelines, the advisory guideline imprisonment range is from 108 to 135 months. Under the Plea Agreement, the Government has recommended a maximum sentence of 108 months, in the absence of a downward departure motion.

The Defendant is not eligible for probation under the advisory guidelines.

E. PERTINENT SENTENCING COMMISSION POLICY STATEMENTS

**F. THE NEED TO AVOID UNWARRANTED SENTENCING
DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS
WHO HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT**

Only one of the core defendants, a member of the infamous HealthSouth “family,” has been sentenced following the acquittal of Richard Scrushy. That Defendant, Aaron Beam, was one of the founders of HealthSouth, and its Chief Financial Officer from 1993 through 1997. He served on the Board of HealthSouth - a very close member of the family. He plead guilty, and like this Defendant, cooperated with the Government. He faced a statutory maximum of 30 years imprisonment. The unsealed record does not reflect what his advisory guideline terms were. In any event, he was sentenced to three months.

Unlike Mr. Beam, this Defendant tried to dissuade the CEO from engaging in the conspiracy, and withdrew from it after the CEO reverted to his previous ways.

**G. THE NEED TO PROVIDE RESTITUTION
TO ANY VICTIMS OF THE CRIME**

The sentence provides that the Defendant will forfeit \$2,375,000 to the Government, which will be used to provide restitution to his victims. He is a

Defendant in several civil lawsuits, and a more lengthy period of incarceration may well impede the ability of the plaintiffs in those cases to collect on any judgment they recover in those cases.

U.S. V. BOTTS
JUSTIFICATION OF THE SENTENCE IMPOSED
18. U.S.C. § 3553 (a)

**A. THE NATURE AND CIRCUMSTANCES OF THE CRIME and
THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT**

This was a deviation from Bott's normal life. He has been a pillar of the community, as shown by the numerous letters in support of him. He is not the type of person you would expect to be involved in this fraud.

Botts was a "latecomer" to an ongoing conspiracy - one well underway five years before he learned of its existence. He was not a member of the inner circle of the conspiracy - "the HealthSouth family," as it was known. He worked in the tax department, not in the accounting department where the fraudulent scheme was devised and implemented. The family concealed the existence of the conspiracy until he unfortunately stumbled across it.

When made aware of the conspiracy, he took the easy way out and went along to get along. He knowingly incorporated false asset schedules into the tax returns for filing so that the Company would overpay taxes so that the fraudulent accounting scheme (devised and implemented by others) would not be compromised.

B. THE NEED FOR THE SENTENCE IMPOSED -

1) TO REFLECT THE SERIOUSNESS OF THE CRIME; TO PROMOTE RESPECT FOR THE LAW; AND TO PROVIDE JUST PUNISHMENT FOR THE CRIME.

The Court must impose a sentence that is sufficient to reflect the seriousness of the crime, to promote respect for the law, and to provide just punishment - no more and no less. Put another way, the Court is not required to impose a sentence greater than necessary to achieve these goals.

The Court has concluded that incarceration of this Defendant is not required to achieve these goals. Particularly, where as here the “head huncho” is found not guilty, and this Defendant is an after the fact minor participant in the overall conspiracy, incarceration would promote disrespect for the law. The significant restrictions on the Defendant’s liberty that are a part of the home detention

component of the sentence, the restitution imposed on the Defendant, and the stigma of his felony conviction are sufficient to reflect the seriousness of his crime, to promote respect for the law, and to punish him justly.

2) TO AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT; and 3) TO PROTECT THE PUBLIC FROM FURTHER CRIMES OF THE DEFENDANT

There is little doubt in the Court's mind that this Defendant has been effectively deterred from any further criminal conduct. His experience, as devastating as it has been, will deter others similarly situated, from taking the easy way out. The dispatch with which he came forward and admitted his guilt, and the invaluable assistance he provided the Government in discovering the details of the crime, and in prosecuting other more culpable criminal defendants will readily be understood by the public as justification for the probation to be imposed. Incarceration in these circumstances would be greater than necessary to achieve the deterrence objectives.

4) TO PROVIDE THE DEFENDANT WITH NEEDED EDUCATIONAL OR VOCATIONAL TRAINING, MEDICAL CARE, OR OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER

These factors are irrelevant to the sentence to be imposed.

C. THE KINDS OF SENTENCES AVAILABLE

The maximum statutory sentence which may be imposed on this Defendant is five years. Statutorily, he would be eligible for probation. Under the advisory guidelines, he is ineligible for probation since the minimum of the guideline range is more than six months.

D. THE SENTENCING GUIDELINES

Without departure, the minimum advisory guideline range of punishment is five years.

E. PERTINENT SENTENCING COMMISSION POLICY STATEMENTS

F. THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT

To the best of my knowledge, only one of the core defendants, a member of the infamous HealthSouth “family,” has been sentenced following the acquittal of Richard Scrushy. That Defendant, Aaron Beam, was one of the founders of HealthSouth, and its Chief Financial Officer from 1993 through 1997. He served on the Board of HealthSouth - a very close member of the family. He plead guilty, and like this Defendant, cooperated with the Government. He faced a statutory maximum of 30 years imprisonment. The unsealed record does not reflect what his advisory guideline terms were. In any event, he was sentenced to three months.

**G. THE NEED TO PROVIDE RESTITUTION
TO ANY VICTIMS OF THE CRIME**

The sentence provides that the Defendant will forfeit \$265,000.00 to the Government, which will be used to provide restitution to his victims. He is a Defendant in several civil lawsuits, and incarceration may well impede the ability of the plaintiffs in those cases to collect on any judgment they recover in those cases.